MCI Telecommunications Corporation
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MCI

ORIGINAL

October 9, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185

Dear Mr. Caton:

Enclosed herewith for filing are the original and four (4) copies of the Opposition of MCI Telecommunications Corporation to Motion of the Rural Telephone Coalition for Stay Pending Judicial Review regarding the above-captioned matter.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Opposition furnished for such purpose and remit same to the bearer.

Sincerely yours,

Lisa Smith

Enclosure
LS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION TO MOTION OF THE RURAL TELEPHONE COALITION FOR STAY PENDING JUDICIAL REVIEW

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OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION TO MOTION OF THE RURAL TELEPHONE COALITION FOR STAY PENDING JUDICIAL REVIEW

SUMMARY

MCI Telecommunications Corporation ("MCI") respectfully opposes the motion brought by the Rural Telephone Coalition ("movant") for a stay of sections 51.303, 51.405, and 51.809 of the Commission's rules promulgated in the First Report and Order implementing section 251 of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the Act").[1] The Commission should deny the motion because movant has made absolutely no showing that it is likely to prevail on the merits of its challenge, nor has it demonstrated that the balance of equities favors granting a stay.

Movant's argument that the Commission exceeded its authority in promulgating the rules on rural exemptions is baseless. The Commission acted well within its statutory

[1]In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Federal Communications Commission, CC Docket No. 96-98 (Released August 8, 1996) ("Order").

authority in defining the phrase "undue economic burden," as economic burdens beyond those normally associated with the advent of competition. Similarly, the Commission's rule requiring parties claiming continued exemption from, or suspension or modification of the Act to demonstrate that they are so entitled comports with the Act's language and purpose.

Movant's arguments that the Commission exceeded its authority by requiring incumbent local exchange carriers ("ILECs") to file preexisting agreements such as Extended Area Service ("EAS") agreements is similarly meritless. The Commission's rules are in accord with the plain, unambiguous language of the statute, and they directly further competition in local markets. Movant's use of section 259 in an attempt to bolster its argument is misplaced: section 259 simply does not apply to the agreements about which movant expresses concern.

Finally, the balance of the equities requires that the Commission deny the stay motion. Issuance of a stay would delay competition, in direct contravention to the public interest in competition expressed in the Act. Although movant makes some effort to argue that operation of the Order will cause it to suffer economically, the "harms" it will suffer amount to no more than those associated with the loss of monopoly status. For all these reasons, the Commission should deny the motion.

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INTRODUCTION

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[2]In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Federal Communications Commission, CC Docket No. 96-98 (Released August 8, 1996) ("Order").

the rules on rural exemptions is baseless. The Commission acted well within its statutory authority in defining the phrase "undue economic burden," as economic burdens beyond those normally associated with the advent of competition. Similarly, the Commission's rule requiring parties claiming continued exemption from, or suspension or modification of the Act to demonstrate that they are so entitled comports with the Act's language and purpose.

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ARGUMENT

I. THE COMMISSION'S ORDER SHOULD NOT BE STAYED.

A. Movant Has not Established any Likelihood of Success on the Merits of its Challenge to § 51.405.

1. The Commission has Clear Statutory Authority to Enact Regulations Implementing 251(f).

Section 251(d)(1) directs the Commission, "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996 . . . [to] complete all actions necessary to establish regulations to implement the requirements of [section 251]." Included in section 251 are the exemption and suspension or modification provisions of § 251(f). Thus, on its face, the Act vests the Commission with clear authority to establish regulations implementing the rural telephone company provisions of section 251.

In accordance with its mandate to establish implementing regulations, the Commission promulgated Subpart E, which includes the challenged section -- section 51.405. In this Subpart, the Commission explicitly recognized that states retain substantial authority in administering section 251(f). In section 51.401, entitled "State Authority," the Commission expressly recognized that the determination whether a telephone company is entitled to exemption, suspension or modification under section 251(f) of the Act is to be made by state commissions. See also Order at ¶1253 (section 251 determinations generally "should be left to state commissions.").

Movant's extended discussion about which commission has authority to grant exemptions, suspensions, or modifications, (see Motion at 3,) is thus entirely beside the point.

State commissions have authority to make such determinations, and the FCC's rules recognize that authority.

2. Nothing in the Rule Enacted by the Commission is Contrary to the Statute

a. The Commission's Definition of "Unduly Economically Burdensome" is Reasonable.

There is no merit to movant's challenge to the Commission's determination that "unduly economically burdensome" means "burden beyond the economic burden that is typically associated with efficient competitive entry."[3] See Motion at 4.

The Commission's determination that "not unduly economically burdensome" means something more than the economic burdens associated with efficient competition is consistent with both the plain language of the statute and with Congress' intent. The Act was designed to "remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition . . ." Order at ¶ 1. Congress certainly knew that competition would impose the "economic burden" of competition for revenue on incumbent monopolists, including rural monopolists. Congress could have chosen to exempt rural telephone companies altogether from the threat of competition. It did not do so. Instead, it provided rural telephone companies with an exemption from the requirements imposed on other ILECS, but only until that rural telephone company receives a bona fide request for interconnection, services, or network elements. At that point, Congress required the state

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[3] The phrase "unduly economically burdensome" is found both in § 251(f)(1) and § 251(f)(2). The Commission interpreted the phrase consistently in both. See § § 51.405(c)-(d).

commission to conduct an investigation, and terminate the exemption "if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254. . . ." Section 251(f)(1)(B). In that context, "unduly economically burdensome" cannot mean anything other than imposing a burden above that associated with the mere advent of competition.

Movant's next argument -- that the Commission's rules shift the statutory presumptions contained in the exemption -- is simply wrong. See Motion at 6. There is no presumption in the statute that a rural telephone company will retain its monopoly status forever. Instead, as noted above, the statute requires state commissions to terminate the section 251(f)(1) exemption from the pro-competitive requirements of the Act unless it finds that a request is unduly burdensome, technically infeasible, or inconsistent with section 254. Similarly, section 251(f)(2) contains no presumption that states will suspend the Act's requirements for rural carriers. Instead, a carrier must petition for suspension or modification and the state commission is authorized to grant such a petition only "to the extent that, and for such duration as, the State commission determines that such suspension or modification is necessary" to avoid a significant adverse economic impact on consumers, to avoid imposing a technically infeasible requirement, and to further the public interest.

Movant's final argument -- that the Commission's rules somehow eliminate other statutory requirements -- is specious. See Motion at 5-6. The statute sets out three criteria a state commission must consider in determining whether a rural carrier can retain its exemption in the face of a bona fide request for interconnection. See 47 U.S.C. § 251(f). The Commission's rules clarify the scope of the first -- whether a request imposes an undue economic burden. Nothing in the Commission's rules, however, eliminates the other two requirements -- that the request

received from a potential competitor is technically feasible and is consistent with section 254 of the Act. Thus, under the Commission's rules states can, and indeed must, consider the final two requirements when making a section 251(f)(1) determination.

b. The Commission's Assignment of the Burden of Proof was Reasonable.

Movant next challenges the Commission's determination that the rural telephone company claiming an exemption from or requesting suspension or modification of the Act's requirements bears the burden of demonstrating that such a departure from the Act is warranted. See Motion at 8-9.

This argument rests on the fundamentally mistaken assumption that rural telephone companies are entitled automatically to exemption, suspension or modification of the Act's requirements, and that a would-be competitor must therefore demonstrate why it would be inappropriate for the rural telephone company to operate outside the competitive strictures of the Act. This interpretation, however, is completely contrary to the purposes of the Act. As the Commission noted, the goal of the Act is to open local markets to competition. If a given rural LEC believes that it cannot endure competition, the statute and the Order provide a mechanism for exemption of otherwise applicable requirements.[4] There is nothing impermissible in the Commission's rule requiring the rural LEC to demonstrate that it should remain exempt, or

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[4] Movant's argument that the "status quo" is exemption from the Act's requirements is simply wrong. See Motion at 7. Rural telephone companies enjoy exemption only until they receive a bona fide request for interconnection. At that point, far from being ensured, the exemption must be terminated unless the state commission affirmatively finds it is warranted. And, carriers must affirmatively request suspension or modification of the Act -- a clear departure from the status quo -- under § 251(f)(2).

qualify for suspension or modification of the Act. Nothing in the Act indicates that Congress intended to require potential competitors to prove that competition should go forward. There is simply no statutory basis for invalidating the Commission's burden rule.

Furthermore, the rule adopted by the Commission is the only one that would make sense. As the Commission noted, the rural LEC claiming it needs to be exempt from the Act's requirements on, for example, the ground that providing interconnection would be unduly economically burdensome, is in the best position to support that assertion. Order at ¶ 1263. The rural LEC, not the would-be competitor, possesses all of the relevant economic data. Requiring new entrants to prove the negative -- that competition would not unduly burden the rural LEC -- would be nearly impossible as a practical matter.

Movant also argues that the burden standard adopted here differs from the Commission's general rules. Motion at 9-10. But, the Commission has the power to adopt generally applicable background rules, and to adopt rules for specific situations that differ. Movant does not, and cannot, contest this point. The reference to the background burden rules found in the Administrative Procedures Act is even more irrelevant; rural LECs seeking continued exemption, or requesting suspension or modification of the requirements of the Act, will not do so under the APA, they will do so under the rules at issue here.

3. There is no "Notice" Issue.

Movants' notice argument is meritless. In its Notice of Proposed Rulemaking, the Commission indicated that it was considering establishing "standards that would assist the states in satisfying their obligations under this section." NPRM at ¶ 261. Parties, including movant, had full and fair opportunity to comment on any and all potential standards -- both in their

opening and reply comments. And, as movants note, some parties did comment on the very rules adopted by the Commission. The rules were adopted after the required notice and comments. There is no "notice" issue.

B. Movant Has Demonstrated No Likelihood of Success on the Merits of their Challenge to §§ 51.303 and 51.809.

Movant next complains that the Order "by federal fiat, sweeps longstanding agreements between neighboring ILECs under the 1996 Act's interconnection requirements," Motion at 15, and that the portion of the rules governing the filing and approval of pre-existing interconnection agreements should be stayed.

Far from imposing new requirements by fiat, the Commission's Order and rules merely reflect the mandate of the Act. The Act itself requires that agreement, "including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act . . . be submitted to the State Commission . . . ." Section 252(a). Section 51.303 simply restates this statutory command.

Presumably recognizing this, movant retreats to the argument that certain agreements, including ILEC-ILEC Extended Area Service ("EAS") and similar agreements, are not actually "interconnection agreements." Instead, it argues, these types of agreements are "infrastructure sharing" agreements governed by section 259. Motion at 15-17. That argument is simply wrong.

Section 259 imposes additional requirements on ILECs with respect to certain "qualifying carriers" -- those new entrants that lack economies of scale or scope, and offer telephone exchange service, exchange access, and any other service included in universal service

through a service area. It does not eviscerate the requirements of section 251, and it certainly does not suggest that existing agreements between ILECs are somehow outside the scope of 251. It does not apply to agreements like those at issue here.

Indeed, the real reason rural telephone companies do not want to file their EAS agreements is not that they are actually section 259 agreements, it is because rural telephone companies do not want those agreements to be subject to the nondiscriminatory availability requirement found in section 51.809. Although movant does not appear to challenge the Commission's "most favored nation" provision generally, it does argue that because section 51.809 will apply to their ILEC-ILEC agreements which will be filed under section 51.303, section 51.809 should be stayed. See Motion at 17.

The statute mandates that these agreements be made available to other carriers on a nondiscriminatory basis. Section 252(i) of the Act requires LECs to make available any interconnection, service or element contained in an agreement that has been filed with and approved by the relevant state commission. EAS agreements must be filed and approved, therefore they must be offered on a non-discriminatory basis to other carriers. There is no exception in the Act for agreements entered into between neighboring ILECs.

Nor does the claim of the rural telephone companies that these agreements are commercially not viable alter the Act's requirement. See Motion at 19. Although movant does not explain why it would be so, if, for some reason, these agreements actually are not viable in a competitive marketplace as movant claims, the correct response would not be to define them out of the statute. Instead, as the Commission expressly recognized, state commissions can reject these agreements, and they can be renegotiated. See Order at ¶ 170.

In addition to mandatory statutory language, the Act's purposes compel rural telephone companies to make these agreements available to competing carriers. EAS agreements, for example, allow customers in rural areas to call into neighboring urban areas for "local" rates. Those urban ILEC's customers in turn can call the rural area for the same "local" rate. If existing EAS agreements remain in effect exclusively, and new entrants are not allowed to take advantage of them, new entrants will not be able to offer the same scope of service at local rates, a result that would unquestionably preclude effective competition. Movant recognize this yet offers no meaningful justification for such a direct contradiction to the Act's fundamental purposes.

Finally, movant argues that the requirements that pre-existing contracts be filed and made publicly available will result in the evisceration of existing agreements and the corresponding increase in rural rates. Motion at 19-21. Even if each relevant agreement would be renegotiated at higher rates, and there is no evidence that they would, the appropriate response would not be to sanction discrimination against potential competitors. The universal service fund is designed to ensure that rural customers do not pay significantly higher rates than their urban counterparts. It is through that mechanism that rural customers can and should be protected from increased costs of service.

The Act requires, moreover, that universal service subsidies be competitively neutral. Allowing rural telephone companies to hide their interconnection agreements, and allow them (and the larger ILECs with whom they have these agreements) to benefit from these secret deals is obviously not competitively neutral, nor is it required to keep rural rates at a permissible level. See Order at ¶ 713. Allowing rural telephone companies to benefit from their secret deals

is simply not allowed under the statute, and would be flatly contrary to the public interest in increased competition.

C. The Equities Weigh Strongly Against Staying Sections §§ 51.405, 51.303 and 51.809.

In addition to likelihood of success on the merits, a court must also consider the balance of the equities in deciding whether to grant a stay: whether petitioner has shown irreparable injury, whether issuance of a stay would substantially harm other parties, and where the public interest lies. Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (1958). Not only will movant fail on the merits of any challenge to the Commission's rules, which clearly merits denial of its motion for a stay, the balance of factors also weighs against imposing a stay. Movant asks the Commission to stay rules that, by design, open up local markets to competition. Although it is not surprising that rural carriers are attempting to avoid true competition, there can be no question that competition is the primary good that Congress sought to achieve in the Act. Staying the Order is therefore directly contrary to the public interest.

Nor can movant demonstrate any harm, much less irreparable harm, if the stay is not granted. It argues that if section 51.305 is not stayed, rural telephone companies will incur costs preparing to meet their burden of demonstrating undue economic burden. Motion at 12. If the Order were stayed, they imply, they would avoid these costs. That argument is baseless. Rural telephone companies will, and indeed are, receiving bona fide requests for interconnection now. Whether or not the Order was in place, states would be required to determine whether the 251(f)(1) exemption should continue to apply, or whether suspension or modification of the

Act's mandates should be granted under 251(f)(2). Even if the Order were not in place, rural telephone companies would have to retain attorneys, consultants and economists to present evidence to the state commissions on the relevant statutory factors.

Movant also argues that if the Order is in place, state commissions will ignore their obligations regarding universal service. Motion at 12-13. This argument appears to assume that the Commission's rule on what constitutes an undue economic burden somehow supplants the universal service inquiry mandated by the Act. As discussed above, however, this assertion is utterly groundless. The Order sets a standard for one statutory criteria, it does not direct or authorize states to ignore others.

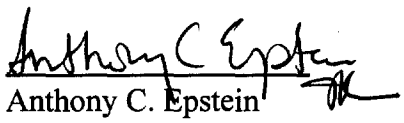
Finally, movant resorts to shrill rhetoric about being "deliberately disadvantaged" under the FCC's Order. Motion at 13. The truth, however, is simple: the Order implements the goal of the statute -- to force monopolists to give up their monopoly control. Although competition certainly takes away an advantage from rural LECs -- the advantage of monopoly -- that "disadvantage" is the purpose of the statute. If true competition threatens to do more than that, imposing an extraordinary economic burden, or harming consumers, state commissions are empowered to stop it.

Movant's arguments for staying the other challenged rules rest at bottom on the assumption that monopoly conditions are best for rural customers, and only monopoly conditions can protect them from higher rates. Motion at 20-21. This utterly ignores universal service, and stands the entire premise of the 1996 Act on its head. Congress determined that choice is best for consumers. Nothing in the Order, or movant's argument, alters that. And nothing movant has pointed to approaches a justification for staying the Order.

II. CONCLUSION

For all the foregoing reasons, the motion should be denied.

Respectfully submitted,
MCI Telecommunications Corporation



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CERTIFICATE OF SERVICE

I, Pamela Glascoe, do hereby certify that copies of the foregoing Opposition of MCI Communications Corporation to Motion of Rural Telephone Coalition for Stay Pending Judicial Review were sent via first class mail, postage paid, to the following on this 9th day of October, 1996.

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